

1952

# Keith Winegar dba Intermountain Oil Distributors v. Slim Olson, Inc. : Brief of Defendant and Respondent

Utah Supreme Court

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Huggins & Huggins; Attorneys for Defendant and Respondent;

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

KEITH WINEGAR, doing business  
as Intermountain Oil Distributors,  
Plaintiff and Appellant,

vs.

No. 7780

SLIM OLSON, INC., a corporation,  
Defendant and Respondent.

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**Brief of Defendant and Respondent**

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**FILED**

APR 14 1952

HUGGINS & HUGGINS  
Attorneys for Defendant  
and Respondent.

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Clerk, Supreme Court, Utah

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**Brief of Defendant and Respondant**

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**STATEMENT**

Appellant alleges, on page 3 and 4 of his brief, that this action was to recover damages for the total loss of a Diesel engine “which loss was caused by reason of the negligent installation of an oil filter bag by the defendant’s employees.”

To state the situation accurately, it was an action to recover damages allegedly caused by reason of an alleged negligent installation of an oil filter bag by this defendant's employees.

Facts pertinent, in addition to those stated by plaintiff and appellant in his brief, are:

Defendant denies any negligence and in turn alleged in its answer that "if plaintiff's property, referred to in said complaint, was damaged and plaintiff suffered any loss thereby, said damage and loss resulted from and was proximately caused by plaintiff's own negligence or some other intervening cause not the fault of defendant".

The case was tried to the court sitting without a jury. After plaintiff had completed the presentation of his evidence and had rested, upon motion of defendant, the court granted a non-suit. Findings of Fact, Conclusions of Law and Judgment of non-suit were thereafter duly made and entered by the court. Rule 41 (b) and Rule 52 (a), Ut. Rules of civil procedure. Plaintiff's evidence showed that the Diesel engine in question, an old 1932 or 1933 Model converted, was delivered to defendant's place of business at Bountiful by plaintiff's agent, on the 24th day of January, 1951, and that defendant furnished a sump bag for which a charge was made as shown on plaintiff's exhibit "A".

After it was serviced the vehicle was taken from defendant's place of business, the same day, by plaintiff's agent, and used to haul heavy loads of oil ranging from 4500 to 5700 gallons per load. It functioned normally until it had travelled 2190 miles. It should have been serviced, as recommended, from 1500 to 2500 miles. It

pulled loads up and down long heavy grades part of the time at speeds up to 50 miles per hour. It was in regular service pulling these heavy loads January 25, 26, 29, 30, 31, and February 1, 1951. The engine functioned perfectly normal during that time. The oil placed in the engine was furnished by the plaintiff and out of his own containers purchased from Phillips 66 Oil Company.

Plaintiff's agent, a Mr. Woolslayer, who drove the unit in question and delivered it to defendant for servicing, on the 24th day of January, remained with it and watched defendant's employees service it, he testified it was his duty to remain with and watch it serviced. On the night of February 1, 1951, the unit was driven from plaintiff's place of business in Bountiful to the Standard Oil Refinery in North Salt Lake City to load. As it approached the refinery, the driver heard a knocking noise. After it was loaded it was driven, with this load of 4625 gallons of oil, a mile south, then up highway 91 about a mile and a half, with intermittant knocking noises, then the oil pressure went down. A mechanic was called by plaintiff's agent who came down to where the driver had stopped it or parked off the highway. He started up the motor and said it run smoothly or normally for two or three minutes then he put it in gear and started up the highway pulling the load. Shortly thereafter a severe knocking occurred, the temperature rose suddenly; the mechanic heard something like a bearing going out and the oil pressure left. The driver hadn't told the mechanic what was wrong.

Plaintiff claims that the damage resulted from a plugged oil line from the sump to the engine. One of his witnesses testified that he knew of no way the damage

could have resulted except through a faulty installation of the sump bag or filter. The court refused to permit cross examination of this witness as to other possible ways it could have resulted except upon penalty of being bound by his answers. Other testimony on cross examination showed there were other possible ways of causing the damage than that suggested. The oil line between the sump and the engine was not produced nor was there any evidence of any examination of the oil line as to whether it was clogged. The evidence indicated that a part of the filter bag was wrinkled as if it had been pulled into an opening when the motor was pulled down.

## POINTS RELIED UPON

### POINT No. I

The court did not err in granting a nonsuit in this case.

### POINT No. II

The court did not err in its Findings of Fact No. V wherein the court found that the evidence of the plaintiff was insufficient to show that defendant failed to use due and proper care and skill.

### POINT No. III

The court did not err in entering a judgment of nonsuit for the reason that said judgment is supported by the Findings and Conclusions, and the Findings and Conclusions are supported by the evidence and the law.

### POINT No. IV

The court did not err in its Finding of Fact No. IV in defining the duty of defendant as one to use due care

and skill.

### POINT No. V

The court did not err in its Finding of Fact No. V that defendant failed to use due or proper care and skill and failed to show that defendant was guilty of any negligent acts.

### POINT No. VI

The court did not err in its conclusion of law that defendant is entitled to judgment of nonsuit.

### ARGUMENT ON THE LAW OF NONSUITS

Points II and VI inclusive relied upon by appellant are and each of them is an integral part of his point I and they will not be argued separately.

1. First, it should be pointed out that appellant bases his case on appeal, on Title 104-29-1 (5), which was repealed by Sec. 104-43-8 Laws of Utah 1951, and superseded by the Utah Rules of Civil Procedure, and more specifically Rule 41 (b), which said rules were adopted by the Supreme Court of Utah effective January 1, 1950. Further, it will be noted that even under the old code of Civil Procedure the plaintiff could not prevail, as plaintiff's citation, relied upon in his brief, are not in point and are not accurate or full citations, and are taken from jury cases.

It is fundamental law that there is a basic distinction between jury and non-jury cases. In jury cases, the court is trier of the law, and the jury is trier of the facts. In the non-jury case, the court is trier of both the law and the facts. The instant case was a non-jury trial



so that appellant's citations to support his appeal are clearly distinguishable and do not apply to those case even aside from Rule 41 (b) Utah Rules of Civil Procedure.

The case cited in appellant's brief in paragraphs 1 ,2, and 3 of his argument pages 7 and 8, Robinson vs. Salt Lake City, 37 Utah 520, 109 Pac 817 and decided in 1910 was a jury case. In Graham vs. Ogden Union Railway and Depot Company, 79 Utah 1, 6 pac. (2d) 462, decided in 1931 and cited by appellant in his argument paragraph 4, page 8 and page 28, it will be noted that the case was one before a jury and clearly distinguishable. The case also involved a directed verdict for defendant, and not a non suit, a further distinction, along with the fact that plaintiff asked to reopen the case to put on more evidence to cure the alleged defect in his evidence, which request the trial court refused to allow. The issue of the sufficiency of the motion for a directed verdict was not raised on appeal, nor was the question of nonsuit raised, so that any ruling on such is dicta and not binding on this court.

In Valiates vs. Utah Apex Mining Company, 55 Utah 151, 184 Pac. 802, decided in 1919 and cited in appellant's brief in paragraph 5 of his argument on page 9, it will be seen that this too was a jury case. It also concerned a motion for nonsuit made by defendant which was overruled, again not in point. The court in this case stated " \* \* \* the trial court must give to plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence *by the jury* \* \* \* ". (Italics ours) the Italicized words were left out of Appellant's brief on page 9.

Smalley vs. Rio Grange Western Railway Company, 34 Utah 423, 98 Pac. 31, decided in 1908, and cited by appellant on page 29 was also a jury case and not in point.

Barlow vs. Salt Lake and U. R. Company, 57 Utah 312, 194 P. 665, decided in 1920 and cited by appellant on page 31 of his brief was a case tried before a jury and further distinguished by the fact that appeal was taken from a refusal of the court to grant a nonsuit for defendant, along with sixty-four other assignments of error. It must be noted, that all of the citations from Am. Juris. by appellant on pages 24, 25, and 26 of his brief were based on cases and texts written before the adoption of the Federal Rules of Civil Procedure. It is further noted that with the exception of appellants first citation on page 24 of his brief, the statements taken from the text concerned jury trials, with supporting citations taken from jury trials where the jury alone is trier of the facts.

This appeal must be determined under the Utah Rules of Civil Procedure as adopted by the Utah Supreme Court, effective January 1, 1950, more specifically Rules 1 (a) Scope of Rules and 41 (b)

\* \* \* \* "After the plaintiff has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that *upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the*

court renders judgment upon the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.” (Italics ours).

This Rule, just cited, is verbatim with Rule 41 (b) of the Federal Rules from which our rules were taken with the exception that the Federal Rules do not contain the last sentence found in the Utah Rules.

Rule 1 A of Utah Rules of Civil Procedure, is essentially the same as Rule one of the Federal Rules and the last sentence is verbatim with the last sentence of Federal Rule 1, except our Rule adds the word “liberally”. Our Rule so far as pertinent here reads as follows:

“ \* \* \* \* They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.”

It is elemental law that when one jurisdiction adopts a statute or law of another, the interpretation of the lending jurisdiction as it exists at the time of the borrowing, will usually be adopted or at least be given very great weight by the borrowing state. So it is with the Rule and Interpretation of the rule which was borrowed by this Court from the Federal Rules.

The latest case found interpreting Rule 41 (b) of the Federal Rules is the United States vs. United States Gypsum Co. 10 F. R. Serv. 41 (b) 14 Case 1, 67 Fed. Supp. 397, decided in 1946 by the District Court of the District of

Colombia. In this case, defendant moved for a nonsuit and dismissal at the end of plaintiff's case, on the ground that *upon the facts and the law, the plaintiffs had shown no right to relief*. (Italics ours). The trial court granted the motion and plaintiff appealed. In upholding the trial courts ruling the appellate court stated:

"A judge in a jury trial does not withdraw a case from the jury on defendant's motion at the end of plaintiff's case unless the judge can fairly say that no reasonable jury man could find for plaintiff \* \* \* But in an action tried *without a jury*, the judge is trier of both the facts and the law. This fundamental distinction between jury and nonjury trials should not be ignored. \* \* \* Rule 1 expressly provides that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action." \* \* \* (Italics ours).

(Utah Rules of Civil Procedure No. 1, as noted above, includes the same provision).

"Therefore a court should dispose of a case at first opportunity which is appropriate with the rules and in accord with the rights of the parties. When a court sitting without a jury, has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has *convincingly shown a right to relief*. (Italics ours). It is not reasonable to require a judge, on a motion to dismiss under Rule 41 (b) to determine merely whether there is a prima facie case, such as in a jury trial should go to a jury, where there is no jury — to determine merely whether there is a

prima facie case sufficient for the consideration of a trier of facts, when he is himself the trier of facts. To apply the jury trial practice in non-jury proceedings would be to erect a requirement compelling a defendant to put on his case, and the court to spend the time and incur the public expense of hearing it if the plaintiff had, according to jury trial concepts, made a 'case for the jury' even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as a trier of the facts, of a right to relief, has no legal right under the due process clause of the constitution, to hear the defendant's case, or compel the court to hear it, merely because the plaintiff's case is a prima facie one in the jury trial sense of the term. \* \* \* \* We conclude that Rule 41 (b) it is the *duty* (Italics ours) of the court to weigh the evidence, to draw the inference therefrom, and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendant on the merits."

No. 29 of the Syllabus reads:

"In Federal Courts, substantial evidence rather than a mere scintilla is necessary to support judgment."

On page 451 of this decision the court further said:

"\* \* \* \* By substantial evidence is meant more than a mere scintilla; it must do more than create a suspicion of the existence of the fact to be established." This case seems to be directly in point with the in-

stant case and lays down the law for judgments of non-suit under the new Rules of Procedure.

In *Barr v. Equitable Life Assurance Society of the United States*, 8 F. R. Serv. 41 (b) .32 Case 1, 149 F. (2d) 634 appealed to the CCA 9th from the District Court of the Northern District of California, Southern Division and decided in 1945, it was held:

“We agree that there is evidence warranting the inference of fact supporting the judgment. We assume there is testimony from which a contrary inference may be drawn \* \* \* \* after the plaintiff has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal *on the ground that upon the facts and the law the plaintiff has shown not right to relief.*” (Italics ours).

In *Bach v. Friden Calculatign Machine Co., Inc.*, 8 F. R. Serv. 41 (b) .14 case 2; 148 F. (2d) 407 CCA 6th 1945, the case was appealed from the District Court of the United States, Southern District of Ohio, Western Division. Upon an appeal from the lower court granting the defendant’s motion to dismiss that under the facts and the law, plaintiff had shown no right to relief, plaintiff appealed. The appellate court upheld the lower courts ruling and stated as follows:

“Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. \* \* \* \* It is clear that it was intended (the adoption of the Rules) to give the

trial court the power to weigh the evidence and draw inferences therefrom at the conclusion of plaintiff's proof, both in law and in equity.

When it is remembered that the purpose of the Rules Practice is to expedite the trial of cases, it would seem that the trial court should be able to dispose of cases at the earliest opportunity and to this end that it should have the power to weigh the evidence and consider the law at the end of plaintiff's case in jury-waived actions \* \* \* \* A plaintiff is deprived of no right by such procedure and a defendant is released of the burden of going forward, and no Constitutional rights of either party is invaded. \* \* \* \* In *Young vs. U. S.*, 111 F. (2d) 823, 825 it was held that the court would not disturb the findings of fact of the trial court unless they were clearly erroneous. \* \* \* \*

The sensible course to be followed in the trial of cases by the court without a jury is that if, at the close of the plaintiff's proof, his case has not been made out by a *preponderance of the evidence*, (Italics ours) the action should be dismissed, which makes the question, one of fact."

These three most recent Federal cases interpreting Rule 41 (b) which is the same as our Rule 41 (b) and as applied under Rule 1 (a) are exactly in point with the case at bar, and are conclusive.

The testimony of Clarence R. Miller who was called as an expert witness for appellant is both ambiguous and contradictory. At page 14 of the transcript, also cited by appellant, Mr. Miller testified on direct examination concerning the filter unit taken from the cylinder in crank

case, which said filter was marked plaintiff's Exhibit D. He first testified:

“Q. And did you see the Exhibit D Extracted from the cylinder?

A. Yes.

Q. \* \* \* \* I call your attention to the bag to a point about a foot up on the bag where the bag seems to be torn. Now, will you tell us where that piece of cloth or that part of the bag was located as far as this pan is concerned at the time you first observed it?

A. Well, we had to pull it out. This part here was out in the discharge hole.

Q. When you say “this part here” point to the area.

A. You can see the rings.

Q. Around the holes and wrinkles around the hole.

A. Yes.

Q. And that was inside the discharge hole. Is that correct?

A. Yes.”

The witness, Miller, then changed his testimony and admitted his prior statements were incorrect when on pages 18 and 19 he testified that it was impossible to see where the bag was. This testimony, still on direct examination, now is as follows:

“Q. You know what had caused the creasing or where that part of the bag had been?

A. Only one place it could have been, is up that



hole, but *you can't see behind there to see whether it was.* You have to pull it out if you have a restriction.” (Italics ours).

Mr. Miller's testimony is further weakened and made more ambiguous by his answer on direct examination as to how the bag allegedly got off the spool and into the discharge hole. His testimony on pages 19 and 20 is this:

“Q. Now then, do you have an opinion as to what caused the bag to get in the discharge hole and off the spool?

A. \* \* \* \* Yes.

Q. All right, what is your opinion?

A. The bag had to get behind the end blade of this spool here in order to get in the discharge hole.

THE COURT: All right:

A. And *I don't know of any other way it could have got there unless it was out there to start with when the bag was installed.*” (Italics ours).

Mr. Miller did not state anywhere in his testimony that he saw the discharge hole blocked, or saw the bag improperly wrapped. In effect it was his opinion that he knew of no other way it could have happened. He then contradicted himself again and changed his testimony by stating that it was possible for the bag to slip. This is shown by his testimony on pages 21 and 22 of the transcript.

“Q. Now, you say that, in your opinion, that (the edge of the bag) got over the end of that plate in the

beginning, you mean at the time of installation.

A. That is what I believe.

Q. Now, will you show us by demonstrating with the bag in which manner that occurred, in your opinion?

\* \* \* \*

A. *It's possible that it could have slipped in that position, I'm not saying that it did.*" (Italics ours)

By this last answer the witness contradicts all of his other testimony and states that the bag could have slipped so that the bag could have gotten into the discharge hole, which in his opinion, is what caused the damage to the engine.

Plaintiff and appellant's second witness, Leslie Holt, also failed to show that he saw the discharge hole plugged, or the sack in the hole, or the bag improperly wrapped by defendant's mechanic. At page 44 he stated:

"Q. \* \* \* \* Did you see the bag in the discharge hole?

A. Didn't see the bag in there. I seen the pieces of it in there.

Q. You did. The pieces only?

A. That's right."

On cross examination Mr. Holt went on to admit that the cam shaft regulator could be defective or plugged with foreign material and build up excessively high pressure. On page 54 of the transcript, he testified as follows:

"Q. In other words, if your regulator is defective,

likely it would build up more than 60 pounds?

A. It would build up excessive pressure.

Q. And it may build up an excessively high pressure if your valve is defective.

A. If it was plugged it would increase your pressure.

Q. Or some foreign material become fast in your oil line. That could also.

A. That would build up pressure in your filter, yes.

Q. And undoubtedly would, would it not?

A. It would build up excess pressure. It would render your by pass valve useless."

"Q. And it would build up sufficient pressure to explode that oil bag. That is, it may."

The court ( we think erroneously) sustained an objection to that question as incompetent, irrelevant and immaterial. T. Pg. 54. The witness further testified that the longer the bag was used without a change of oil the more pores in the bag would become clogged with sludge and carbon particles, he did not see the bag or spool, Exhibit D, installed, but said the spool was properly installed and fastened as far as he could see externally when he saw the engine after the damage was done. T. Pg. 56 and 57.

The third expert witness, called by plaintiff and appellant, was William R. McLelland who did not see the engine in question, and who was not there when it was torn down. He did not see a blocked oil line nor the posi-

tion of the bag when it was removed. His testimony on the damage to the engine and what caused such damage was incompetent and should be ignored. Appellant's statement in his argument on page 24 that this witness stated the bag had been sucked into the discharge line and blocked said line completely is absolutely incorrect and should be disregarded.

The witness did say, however, in answer to the question "how long it would take a bearing being starved of oil, pulling loads uphill, to burn out or be destroyed.

A. Well, if the oil is blocked off it's just a matter of seconds, I would say."

It is obvious from close examination and correct interpretation of the transcript of testimony that there is absolutely no direct evidence that defendant and respondents mechanic improperly or negligently wrapped the filter bag in question. There is absolutely no direct evidence that the oil line was plugged or that the filter bag plugged it. To the contrary, Mr. Miller, on cross-examination, stated that the filter bag could have *slipped* into the position that plaintiff and appellant allege defendant's mechanic had wrapped it.

This Court, in *Putnam v. Industrial Commission* 80 Utah 187, 14 P (2d) at page 981 decided in 1932, held that the testimony of a witness is no stronger than his testimony on cross-examination in the following words:

"The familiar rule is applicable that the testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination."

In the absence of direct testimony as to any negligence of defendant's employee, the absence of direct testimony that the oil line was plugged or that the filter bag was in said hole, coupled with the witness Holt's admission, on cross-examination, that the bag could have slipped, and the mileage the truck had traveled and the use to which it had been put, the trial court correctly granted a nonsuit against plaintiff on the merits. The trial court heard all of plaintiff's evidence, weighed it, and decided that, under the facts and law, plaintiff ought not to prevail. The trial court as trier of the law and the facts ought not be forced to hear defendant's case when he has not been convinced that plaintiff should prevail.

Appellant's citations, upon which he based his appeal, have no bearing on this case. First, said citations were all taken from jury cases as distinguished from this instant case which was a non-jury trial. Secondly, each of his cases was based on the law under the repealed code-section, having been replaced by our Utah Rules of Civil Procedure which were copied from the Federal Rules.

Appellant's contention that the motion made for a non-suit was not sufficient in detail is without merit. Rule 41 (b) as cited above, states that the defendant

“\* \* \* \* may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.”

In the instant case, defendant moved for a nonsuit and dismissal

“upon the grounds and for the reason that there has

been no negligence shown or proved to the court sufficient to make a prima facie case”  
and upon the further ground  
“that the evidence of the plaintiff itself shows contributory negligence.”

This motion is more specific than that required by the rules and is certainly sufficient for the court to grant a non-suit. In any event, the plaintiff and appellant made no offer of further testimony, nor did he ask in what particulars his case was wanting, nor did he ask for a new trial. It is clear this appeal is without merit.

Plaintiff's evidence also shows affirmatively

(1) That the truck in question made regular trips after defendant serviced it as follows: January 25th, to Idaho Falls, Idaho; 26th, Rock Springs, Wyoming; 29th, Burley and Rupert, Idaho; 30th, Pocatello, Idaho; and 31st, Wattis, Utah, Exhibit F, and February 1st Spring Canyon, Utah Exhibit G. T. Pg. 63.

(2) The capacity of the trailers being pulled by it ranged from 4500 to 5700 gallons. T. Pg. 74 and 76.

(3) Some of these hauls were over long and heavy grades. T. Pg. 76.

(4) And at speeds up to 50 miles per hour and on hills as low as 10 miles per hour. T. Pg. 77.

All of which necessarily putting a terrific strain on the motor and the oil filter, for considerable of the whole 2190 miles traveled by it after being serviced. During all that time the motor functioned smoothly and normally. T. Pg. 64 and 65.

(5) The oil used in servicing the motor by the de-

fendant was plaintiff's own oil purchased by him from Phillips 66. T. Pg. 69 and 70, and

(6) Plaintiff's agent, Woolslayer, delivered the truck to defendant and watched it being serviced. T. Pg. 67. He testified it was his duty to remain with and watch it being serviced. T. Pg. 69. He saw nothing wrong with the manner in which it was serviced or he would have testified to that fact. He admitted that he helped to service it. T. Pg. 69.

Plaintiff's witness, Miller, who undertook to wrap the filter as he thought it must have been wrapped by defendant, said:

“Q. \* \* \* \* Now, were you or were you not very conscious of the fact that was sticking out of the end?

A. I imagine I did. I rolled it on purpose, didn't I. \* \* \* \*

Q. You were extremely conscious of the fact that the bag was over there?

A. Yes.

Q. And if you had wound the bag like that, not knowing that you had so wound it and put it in there, you would immediately be called to the attention that the bag was sticking over the end or the point, wouldn't you?

A. That's right, yes.” \* \* \* \*

The charge here, it must be remembered, is a negligent installation, not an intentional and deliberate wrongdoing as this witness testified to.

He also testified that it was an "old motor," he didn't know "when it was worked on last". T. Pg. 35.

That cold oil may blow the filter bag out. T. Pg. 39.

The bag can move under oil pressure. T. Pg. 40.

Plaintiff's witness, Holt, in testifying how he thought the filter bag was installed agreed with Miller that such installation would have had to have been intentional and deliberate.

"Q. Now, you have wrapped the filter bag and the spacer unit in the manner in which you think it was wrapped when it was installed on January 24, 1951, at Slim Olson's?

A. Yes, that's right.

Q. Is that correct?

A. That's the way I believe it was.

Q. In wrapping that, you have deliberately pulled a portion of the bag out over the ear in the flange. Is that right?

A. Yes.

Q. And you had to wrap and unwrap that five or six times and deliberately pull that out to get it wrapped that way, didn't you?

A. I did that time.

Q. That is the way you think this bag was installed?

A. Yes.

Q. And if it were wrapped the way you have indicated it was wrapped and for you to wrap it that way,



it would have to be intentionally and consciously done that way.

A. Yes. \* \* \* \*” T. Pg. 50.

Again,

Being asked about whether, when the engine was started up pumping the oil into the filter bag it would inflate the bag up evenly throughout and iron out any wrinkles, said —

“Q. Wouldn’t it iron out all the wrinkles?

A. It’s possible.

Q. Blow them up like you blow air into a paper bag and fill in all the wrinkles and even it out, wouldn’t it?

A. I presume it would, yes.” \* \* \* \* T. Pg. 52.

“Q. The answer is ‘yes’.

A. Yes.” T. Pg. 53.”

He further testified that would happen the first time the motor was started up and every other time it was started during the full 2190 miles. T. Pg. 53. \* \* \*

He clearly showed a way other than that testified to by Miller and others in which the lines could be clogged — stopping the flow of oil to the engine and causing the damage complained of.

Also, the witness, Holt, testified similarly upon being recalled as follows:

“Q. So that if the discharge pipe to the cam shaft became clogged with sludge or something else, there

would be no place for the oil to go except to build up such pressure that something would break.

A. Something would have to break. That pump has a capacity of about 15 gallons per minute.

Q. Wherever the clogging occurred between the spool, exhibit D, and the camshaft, it would have that same result?

A. You would build up back pressure.

Q. Now, assuming, Mr. Holt, — that is hypothetical now. Assuming that the line to the camshaft became clogged and built up a terrific pressure in the cylinder, Exhibit C, and then was suddenly released, there would be a tendency for oil to rush under that extreme pressure very quickly and fast into the outlet from the spool in the cylinder, very quickly. Is that true?

A. I imagine that would be.”

That being the case then, under those circumstances, the filter bag, being properly installed, could be forced under that extreme pressure into the discharge line clogging it and resulting in the damage complained of.

## ARGUMENT ON CONTRIBUTORY NEGLIGENCE

Specifically denying any sufficient evidence of negligence on the part of defendant, but for the sake of this argument in the event evidence of negligence upon any theory should be found, we think it pertinent here to include some of the testimony of plaintiff's witnesses on cross examination with respect thereto.

“Q. (Mr. Aadneson) Are you willing to stipulate as to what the mileage of the truck in question was from

the time of service until the time of plugging?

Mr. Burton: Yes. We have that 2190 miles. To save time; I think that's 2190 miles. I wrote that down."

Cross-examination T. Pg. 31.

Mr. Miller

"Q. Your indulgence a minute, Mr. Miller, how often should this oil filter bag be changed?

A. I recommend every oil change.

\* \* \* \*

Q. Do you have a lubricating standard for Cummings motors?

A. Yes.

Q. How often does it recommend an oil change?

\* \* \* \*

A. We recommend — are you talking about the Cummings Company?

Q. You. What do you recommend?

A. The customer usually decides. We recommend anywhere from 1500 to 2500.

Q. Oil change?

A. Yes.

Q. Do you have a knowledge of what Cummings recommends?

THE COURT: They have that here. There's no need of asking that.

Q. Will you stipulate what the recommendation is:

MR. BURTON: Yes. If you have anything to claim for it. It's every 500 gallons.

MR HUGGINS: What?

A. Every 500 gallons of fuel oil. If you get 5 miles a gallon you will get what?" T. Pg. 33 and 34.

Thomas H. Mitchell

Cross examination.

"Q. Then how long did you run the motor, you say, before you threw the truck in gear and started moving the truck itself?

A. Oh, I imagine 2 or 3 minutes.

Q. Didn't hear anything of an unusual nature then.

A. No.

Q. Then you threw it in gear and started moving.

A. That's correct.

\* \* \* \* \*

Q. And where were you when you heard or saw or noticed anything of an unusual nature?

A. Well, I just got back on and just got going.

\* \* \* \* \*

Q. What did you hear finally that called your attention to the fact that something was perhaps wrong?

A. Well, I heard something like a bearing going out and temperature rising and oil pressure left, and the only thing you could do is stop." T. Pg. 90.

Theone Green testified direct

“Q. Was there anything unusual in the operation of the truck during that distance? (five or six miles between Phillips and Standard).

A. I never noticed anything until I approached the loading dock at Standard Oil.

Q. All right. Then what did you notice?

A. Well, I detected a slight, what I called a knocking noise, different to the normal sound of the engine.

Q. And what did you do at the time?

A. Well, I went ahead and pulled into the dock and loaded my truck and after I was loaded I pulled out from the dock so those behind me could load, and stopped the engine and pulled the dip stick on the engine to see if the oil supply was normal, see if I had a normal supply of oil, if it was up to level.

\* \* \* \* \*

Q. What is the next thing you did?

A. Then I started back to the highway from the refinery, down to the road to get on the highway and keeping a check on the oil gauge to see if something was wrong.” T. Pg. 96.

Q. All right. What did you see?

A. The oil stayed up to normal.

THE COURT: Proceed clear to where you stopped.

A. I proceeded south from the refinery approxi-

mately a mile, I would say, where you turn left across the tracks at Beck's Hot Springs then onto highway 91, and I proceeded north about a mile and a half, I would say, and occasionally, one or two times I detected knocking, or thought I did, and when I got about a mile north, or a mile and a half north, to the time I stopped, the oil gauge fluctuated, started to fall off. I started losing power. I pulled the compression gauge on the engine and stopped it."

Cross examination.

T. Pg. 97.

"Q. Did the engine continue to knock until you stopped at the dock for your load at Standard?

A. No. Just a slight knock intermittently. It wasn't a steady knock. T. Pg. 125.

\* \* \* \* \*

Q. You didn't stop the motor to determine what was causing the knocking?

A. I stopped it as I pulled up to the dock just a few feet after I heard it.

Q. Did you call a mechanic at that time to come and inspect the car?

A. No, I didn't.

Q. You are not a mechanic.

A. No, sir.

Q. And of course you realized at that time you were not a mechanic?

A. Right.

Q. Did you realize you were operating an expensive piece of machinery?

A. Yes, sir.

Q. Yet, notwithstanding you heard this unusual knocking, you called no mechanic to see what the trouble was.

A. I didn't call him then, no.

\* \* \* \* \*

Q. In full knowledge you had some kind of motor trouble you pulled out with a load.

A. I didn't think I had motor trouble. T. Pg. 106.

\* \* \* \* \*

Q. When did you first notice the knocking sound again?

A. Well, the first heavy knocking I got was when I approached, started on highway 91.

Q. Where was the first light knocking?  
court intervene. \* \* \* \*

A. I noticed it as I was proceeding from Standard Oil, after and on, but not heavy until I got to highway 91 and proceeded north. T. Pg. 107.

Butte v. Pleasant Valley Coal Co. 14 Ut. 477 p. 77, 78, it was held that

“while the defendant may have been guilty of negligence that contributed to the injury complained of, it is clear that the plaintiff's negligence also contributed to the same injury \* \* \* \* where there is no evidence of the existence of a fact essential to a recover, or when the evidence establishes a fact fatal

to a recovery with such certainty as to leave no reasonable doubt in the minds of fair men, the court should grant a nonsuit, or, if the case is submitted to a jury, instruct a verdict for the defendant.”

## CONCLUSION

We have printed in our brief several excerpts from plaintiff's witnesses showing conflicting statements, also developing, as far as the trial court would permit, that there were other ways in which the damage could have resulted, in refutation of their direct testimony on direct examination that “they knew of no other way the damage could have been caused.” It necessarily follows then that, as left upon cross-examination, there was no testimony of such a nature to convince the learned trial court that any negligence was shown. Consider this with the further testimony that plaintiff's own agent watched and helped the defendant service the engine and he saw nothing wrong with the manner in which it was serviced, and also with the evidence of plaintiff's witness of the manner in which they operated the truck 2190 miles after it was serviced, and under considerable strain and varied conditions even after indisputable and audible evidence on the night of February 2nd that something had gone wrong with the motor we must conclude then and we submit that:

1. The court sitting without a jury, having heard all of the plaintiff's evidence correctly concluded that the plaintiff had not convincingly shown a right to relief — as the rule was construed in *United States v. United States Gypsum Co.* *supra*.



2. The evidence of plaintiff clearly shows negligence on his part in the operation of the truck, but shows no negligence on the part of defendant.

3. The motion for nonsuit was more fully stated that required under our rules of civil procedure as construed by the Federal courts.

4. Plaintiff's theory of the case and the cases cited by him are clearly not in point under Rules 1 (a) and 41 (b) Utah Rules of Civil Procedure and

5. This Supreme Court in its most recent case of Liquor Control Commission v. Chris E. Athis and C. V. Lack, No. 7738 and Filed April 10, 1952, has followed the construction placed by the Federal Courts on its Rules, in the construction of the Utah Rules of Civil Procedure which are, to all intents and purposes, verbatim.

6. The motion for nonsuit was properly granted.

Respectfully submitted,  
HUGGINS & HUGGINS